THE RECORD
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

EDITORIAL BOARD

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THE RECORD is published at the House of the Association, 42 West 44th Street, New York 36

Volume 7 November 1952 *Number 8*

Association Activities

AT THE October Stated Meeting the Association adopted the following resolution, presented by H. H. Nordlinger, approving the report of the Advisory Bar Committee to Study the Problem of Contingent Fees:

> RESOLVED, that The Association of the Bar of the City of New York approves the report of the Advisory Bar Committee to study the problem of contingent fees submitted to the Stated Meeting of the Association on October 21 and authorizes the officers of the Association to take such steps as may be necessary to carry out the recommendations contained in the report.

The report recommends to the several Associations, which created the Committee, that they declare that it shall be improper for attorneys in any personal injury case in which they are retained to demand or receive contingent fees aggregating more than 35% of the net amount of the recovery after deduction of the reasonable expenses of prosecuting the case unless, by reasons of exceptional circumstances (such as, for example, retrials or appeals), payment and receipt of a larger amount (the aggregate in no event

to exceed 50%) are approved by the court in which the claim was prosecuted or by a court of competent jurisdiction.

The meeting also approved the report of the Committee on the Judiciary, Louis M. Loeb, Chairman, which recommended that the following candidates for judicial office be found "qualified":

SUPREME COURT

Joseph A. Cox
Benedict D. Dineen
Arthur H. Schwartz

COURT OF GENERAL SESSIONS

Abraham N. Geller
George J. Mintzer

SURROGATE'S COURT, BRONX COUNTY

M. Maldwin Fertig
Christopher C. McGrath
David M. Potts

The report of the Committee on the Municipal Court of the City of New York, William G. Mulligan, Chairman, was also approved, and the following candidates found "qualified":

THIRD DISTRICT, MANHATTAN

Jules J. Justin
Eugene M. McCarthy

FIRST DISTRICT, THE BRONX

John J. De Pasquale
Joseph G. Josephson

SECOND DISTRICT, QUEENS

John V. Downey
Meyer Tobias
Joseph Spencer

SIXTH DISTRICT, BROOKLYN

Murray H. Pearlman
Frederick L. Cohen

The Committee found Vincent N. Trimarco, incumbent Justice in the First District of The Bronx "outstandingly qualified," and found George W. Fish, Sixth District, Brooklyn, "not qualified."

Dudley B. Bonsal, Chairman of the Committee on Foreign Law, presented a report on the International Congress of Free Jurists, a summary of which is published in this number of THE RECORD.

Interim reports were received from the Special Committee on the Association's Accident and Health Insurance Plan, George I. Gross, Chairman; the Committee on International Law, Dana C. Backus, Chairman; and the Committee on Junior Bar Activities, John R. Miller, Chairman.

THE COMMITTEE on Courts of Superior Jurisdiction, Albert R. Connelly, Chairman, has devoted the summer months to the study of two projects dealing with the improvement of judicial administration. One is the expert medical testimony project. A second project involves a consideration of the desirability of an administrative officer for the Supreme Court. The Committee will also continue to study discovery practice in the state courts.

THE COMMITTEE on Real Property Law, Albert W. Fribourg, Chairman, has prepared a report on rights of mortgagees to retain fire insurance proceeds. The report stems from the decision in *Savarese* v. *Ohio Farmers Insurance Co.* (1932) 260 N. Y. 45.

IN OCTOBER the President and the Committee on Criminal Courts, Harris B. Steinberg, Chairman, entertained at the House of the

Association Mayor Impellitteri, Deputy Mayor Horowitz, Chief Justice Cooper, and the Justices of the Court of Special Sessions, and Chief City Magistrate Murtagh, and the members of his Court.

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At its organization meeting the Committee on Administrative Law, Allen E. Throop, Chairman, decided to establish subcommittees dealing with the following subjects: procedure under the Immigration Act; procedures of emergency agencies; overlapping jurisdiction of federal agencies; the Federal Administrative Procedure Act; Article 78 of the Civil Practice Act and judicial review generally; proposed State Administrative Procedure Act; and the relationship of the Bar and the administrative system.

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Over sixty law schools are now entered in the National Inter-Law School Moot Court Competition sponsored by the Committee on Junior Bar Activities, John Roberts Miller, Chairman. These schools are participating in twelve regional competitions. The regional winners will come to New York for the finals of the competition during the first week in December. Mr. Justice Stanley F. Reed of the Supreme Court of the United States will preside at the final argument on December 5.

∞

The executive Committee has established a Special Committee to advocate the need for a new City and Municipal Courthouse. The members are Maurice T. Moore, Mathias F. Correa, Charles Horowitz, John Roberts Miller, William G. Mulligan, David W. Peck, Timothy N. Pfeiffer, and W. Mason Smith, Jr. Whitney North Seymour, Jr., is secretary. The Committee, together with representatives of the New York County Lawyers' Association, The Legal Aid Society, and the Harlem Lawyers Association prepared a report which was submitted to the City Planning Commission and to the Board of Estimate supporting the De-

partment of Public Works' request to the Commission for inclusion of a $2,500,000 item for a new courts building in the 1953 capital budget. This item would provide $500,000 for plans and supervision and $2,000,000 for site acquisition.

A SUBCOMMITTEE of the Committee on Municipal Affairs, W. Mason Smith, Jr., Chairman, is studying the possibility of changes in the provisions of the City Charter or the Administrative Code regarding the functions of the Commissioner of Investigation of the City of New York, and particularly the reports by the Commissioner to the Mayor. The Committee also has been authorized by the Executive Committee to file a brief *amicus curiae* in the Court of Appeals in the case of *Walter A. Gorman and Edward Rogers, Jr.*, v. *The City of New York.*

JOHN J. MCCLOY, former United States High Commissioner to Germany, delivered the first in the series of lectures sponsored by the Committee on Post-Admission Legal Education, Parker McCollester, Chairman. Mr. McCloy spoke before a large audience on "Germany and the New Europe."

IN SEPTEMBER the President entertained at the House of the Association The Right Honorable Sir John Morris, C.B.E., M.C., Lord Justice of Appeal, who was returning from San Francisco, where he attended the Annual Meeting of the American Bar Association.

DURING THE summer the Standing Committee on Law Lists of the American Bar Association revoked the certificate of compliance which was issued in 1951 to the Central Guarantee Company, Inc., covering the March, 1952, edition of Corporation and Administrative Lawyers Directory. Those law lists which are ap-

proved by the Standing Committee were published in the February number of THE RECORD.

THE ENTERTAINMENT Committee, Boris Kostelanetz, Chairman, has decided to sponsor during the coming year a Twelfth-Night entertainment, a dance, and the Annual Association Night Show. Dates for the show have been set for the week of April 13.

SIDNEY B. HILL, the Librarian of the Association was elected President of the United States Book Exchange. The Exchange, with headquarters in the Library of Congress and a staff of 21 librarians, is engaged in exchanging, among libraries, international and domestic publications. The Exchange also acts as a clearing house.

The Calendar of the Association for November and December

(As of November 3, 1952)

November	5	Dinner Meeting of Executive Committee Meeting of Section on Labor Law Meeting of Section on Wills, Trusts and Estates
November	6	Meeting of Section on Taxation Meeting of Subcommittee on Civil Service of Committee on Municipal Affairs
November	10	Dinner Meeting of Committee on Real Property Law
November	12	Dinner Meeting of Committee on Copyright Dinner Meeting of Committee on Municipal Affairs
November	13	Meeting of Committee on Aeronautics Dinner Meeting of Committee on Insurance Law
November	17	Meeting of Library Committee Dinner Meeting of Committee on Medical Jurisprudence
November	18	Dinner Meeting of Committee on Domestic Relations Court
November	19	Meeting of Committee on Admissions Dinner Meeting of Committee on Foreign Law Round Table Conference, 8:15 P.M. Guest to be announced
November	20	Dinner Meeting of Committee on Legal Aid New York Regional Moot Court Competition. Auspices Committee on Junior Bar Activities
November	21	New York Regional Moot Court Competition. Auspices Committee on Junior Bar Activities
November	24	Meeting of Section on Administrative Law and Procedure Dinner Meeting of Committee on Courts of Superior Jurisdiction

November 25 Meeting of Section on Litigation
Dinner Meeting of Committee on International Law
Dinner Meeting of Committee on Taxation

December 2 Meeting of Committee on Arbitration
Dinner Meeting of Committee on Municipal Court
Meeting of Section on Trade Regulation
Dinner Meeting of Committee on Trade Regulation and Trade-Marks

December 3 Dinner Meeting of Executive Committee
Meeting of Section on Labor Law
Meeting of Section on Taxation
Meeting of Section on Wills, Trusts and Estates

December 4 National Moot Court Competition. Auspices Committee on Junior Bar Activities

December 5 National Moot Court Competition. Auspices Committee on Junior Bar Activities

December 8 Meeting of Committee on City Court
Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on Professional Ethics

December 9 *Stated Meeting of the Association, 8:00 P.M. Buffet Supper, 6:15 P.M.*
Meeting of Committee on Insurance Law

December 10 Meeting of Section on Corporations
Dinner Meeting of Committee on Municipal Affairs

December 15 Meeting of Library Committee
Dinner Meeting of Committee on Medical Jurisprudence

December 16 Dinner Meeting of Committee on Domestic Relations Court

December 17 Meeting of Committee on Admissions
Meeting of Committee on Foreign Law

December 18 Meeting of Section on Jurisprudence and Comparative Law

December 22 Meeting of Section on Administrative Law and Procedure

Dinner Meeting of Committee on Courts of Superior Jurisdiction

December 23 Meeting of Section on Litigation

Atomic Attack and the Legal Structure

By Carroll L. Wilson and David F. Cavers

Since Judge Patterson first appointed the Association's Special Committee on Atomic Energy in 1949, it has been the Committee's central objective to develop an understanding of the national atomic energy program and of the policies guiding it.

The work of the Special Committee has been unusual in that, thus far, it has sought to reach no specific conclusions. Rather, it has sought, in a relaxed and agreeable fashion, to review the unclassified literature on matters atomic, to keep itself informed on current published developments, and, by the seminar technique, to elicit information and understanding from those who, in one way or another, have borne the responsibility for our nation's atomic effort.

In the course of its explorations the Special Committee opened up what, in a sense, is a civil defense problem, but one which offers a practical challenge to lawyers: namely, to what extent can the disastrous consequences of hostile atomic attack be mitigated by legal planning? This problem at first blush seemed hopeless. Yet the more the Committee deliberated the more it was persuaded that it was not.

Constructive planning in advance of such a grisly event might, we thought, make it possible for civil authorities to maintain civilian control and not default to martial law. Military authorities will be busy enough with purely military matters. They cannot be expected to find satisfactory answers in a time of stress to problems which citizens, with time at their disposal, have not succeeded in solving. Planning now, moreover, might well confine the destructive effect of an atomic attack to the area of actual physical destruction rather than allow it to paralyze those legal, fiscal and economic relationships throughout the nation whose preservation will be essential to effective resistance.

As part of the inquiry into this problem the Special Committee

arranged a seminar one afternoon last March. This seminar, which lasted until late in the evening, was attended by members of some of the principal Committees of the Association, by representatives from the Atomic Energy Commission, the Federal Civil Defense Administration, the National Securities Resources Board and the Federal Reserve Bank. The discussion was in three parts: first, what are likely to be the physical consequences of an atomic attack on a major American city; second, what legal problems can be identified as likely to arise following an atomic attack, and, finally, what lessons does the experience of Holland, England, Germany, or Japan in the last war, or San Francisco in the great fire of 1906, provide? The first part of the discussion was led by Mr. Carroll L. Wilson, formerly General Manager of the Atomic Energy Commission and now Director of the Industrial Development Department of Climax Molybdenum Company. Professor David F. Cavers, Associate Dean of the Harvard Law School, outlined the second problem and Mr. Conrad W. Oberdorfer of the Boston Bar, handled the final subject.

This seminar was not only interesting—it has been productive. The transcript of it has been made available to lawyers and scholars for further work. Professor Richard Donnelly of the Yale Law School and the Federal Civil Defense Administration have both done further constructive thinking in this field. Several legal articles on the subject are now in process of publication, but, thus far, the legal periodicals have been virtually silent. An exception is Homer D. Crotty's article "The Administration of Justice and the A Bomb: What Follows Disaster?" which appeared in the December, 1951, issue of the American Bar Association Journal. Eventually, it is hoped general discussion among lawyers will be directed to methods by which resiliency can be imparted to the legal system so that, even if it cannot withstand, at least it will bend gracefully and not fracture in the face of, an atomic attack.

For these reasons the Special Committee believed it would be both fruitful and interesting for the members of the Association

as a whole to read the transcript of the oral presentations made last Spring at its seminar by Mr. Wilson and Professor Cavers. Their remarks appear immediately below.

O.M.R.

October 7, 1952.

SPECIAL COMMITTEE ON ATOMIC ENERGY

Oscar M. Ruebhausen, *Chairman*

R. Morton Adams	Daniel James
Edgar P. Baker	Beryl H. Levy
William H. Davis	Alfred McCormack
William E. Jackson	Herbert Wechsler

Mr. Carroll L. Wilson:

I have tried to think of the purpose of what I shall say this afternoon. It is primarily to provide a description of the character and scale of the results of atomic bombing, not I hope for the purpose of inducing people to say it is hopeless and "there is nothing we can do," but rather to give some measure of the scale and character of the disaster which would ensue, and to try to relate this to New York City. I am glad that Professor Cavers' description and presentation will follow mine, because I seem to have the morbid chapter, and I think he will have something to say about identifying the things that can be done now and in the future to diminish the degree of chaos that would result from atomic attack on New York.

I hope that there will be affirmative results from this discussion, and I am sure it is your objective to pitch the discussion on the things that can be done and which will be constructive and useful, in spite of the enormity of the catastrophe which would ensue from attack on any large city, and, for the present purposes, on New York City.

I shall also say a little about the preparations which have been taken to meet this situation. I probably can say less about that than some of the other people here, but I do hope that the result will be a feeling that there is a "defense against atomic attack," this obverse being one of the terms that has had rather widespread acceptance in

the last few years. Many of the things which can be done lie within the competence of people here and their colleagues in private life.

There are some assumptions that we have to make in discussing this subject and in setting a perspective for what I will say later. I shall state these assumptions: First, that there is a finite probability of war with the USSR. Were this not the case, we would not really have something of direct concern.

Second, that atomic weapons will be used in such a war. The assumption here is (a) that the Russians have atomic weapons; (b) that in the event of a war, they would be used by both sides.

As is well known, much of our general strategy is based on the use of atomic weapons, and it is reasonable to expect that Soviet strategy has similar factors in it. Now, this, I think is particularly likely, because it is the only way the USSR or the USA could directly attack each other.

The third assumption is that New York City would be a prime target, because it is the greatest port to Europe, the largest center of industrial and financial control of industry, and it is extremely vulnerable to dislocation, plus having many symbolic aspects. It is the largest city in the world, and has a very high population density.

Another reason why New York is an attractive target is that seaports are generally vulnerable to surprise attack because of the long over-water approaches.

Another assumption is that maximum destruction is produced by an air-burst atomic bomb. There has been much written and said about under-water bursts, and it is certainly true that the consequences are extremely unpleasant and very destructive, but in terms of yield—that is, the maximum destruction of property and life—an air-burst bomb is a good deal more efficient than an under-water burst.

Also, in terms of the discussion here, we will assume that the bomb is what the Atomic Energy Commission chooses to call a "nominal bomb of the Nagasaki variety," which is a 20,000 ton TNT equivalent and is exploded at an altitude of 2000 feet. Such a weapon produced the results which have been studied in Japan. While there is certainly reason to believe that more powerful bombs have been made and will be made, the destruction does not go up in a linear sense, but only as

the two-thirds power of the explosive energy release of the bomb. Furthermore, in atomic bombing, there is such over-destruction of the area immediately under the burst, that the additional effect obtained by increasing power is less than might be expected.

Another assumption which I have made, which I think is reasonably fair, is that the scale and character of destruction in an American city such as New York is not too different from that which was experienced in Japan. It is different in some respects which I will mention later, but we cannot draw too much comfort from the fact that the Japanese have a lot of rather flimsy construction. They also have quite a lot of pretty rugged construction.

Those are the main assumptions.

In terms of the character of atomic weapons, as compared with conventional high explosives, the difference in scale really brings about a difference in kind. Even the most lusty block busters of conventional TNT have a limited effect in terms of collapsing whole buildings and the like, whereas with an atomic weapon there is the phenomenon of mass distortion and collapse of buildings over very considerable areas. Actually there are winds of the order of 800 miles an hour at the point beneath the bomb burst, and they aren't normal winds of the kind that build up gradually, but they have a shock wave front, which is just like a hammer blow, so that the most pronounced effect is the mass distortion and collapse of buildings.

The second major effect is the intense radiant heat, which renders a good many materials combustible, which would not otherwise be.

A third primary effect is the nuclear radiation.

As a consequence of the blast wave there is a collapse of structures and buildings over a considerable area, and many secondary fires are started. It isn't that things are ignited largely by the radiant heat from the bomb, but all sorts of secondary fires are started by stoves being overturned, furnace connections, gas lines, electric wiring severed and so on, and it is spread of these secondary fires which is perhaps the greatest source of ultimate destruction.

In sequence then, there is the destruction of buildings and the starting of secondary fires. The destruction of buildings fills streets with debris and scatters it over fire breaks, such as existed in Hiroshima at least, so that the whole area becomes inaccessable. People

cannot get in or out, and this is particularly true where you have a relatively high ratio of buildings to total area as in New York. A paralysis of movement in the area results.

Another effect is that a great many water connections are broken, and hence water pressure, except for deep mains, drops off and the fires which are started in this area spread, and combating them is extraordinarily difficult.

Also a phenomenon occurs, which is not exclusively related to the atomic bomb, which was found in some of the fire raids on Tokio. When there are enough uncontrolled fires burning in a given area, they tend to create a great bonfire known as a "Fire Storm." The air comes in from all sides and has the effect of limiting the spread of the fire, but it also does lead to a great conflagration which consumes the area that is burning.

The effects on personnel are these: First of all, the people who are directly exposed to the flash from an atomic weapon are exposed to intense radiant heat, and receive flash burns out to about 13,000 feet.

I do not know the exact figures, but I think it was said that an atomic burst is brighter than 100 suns, and I think that is probably a fair measure of the intensity of the radiation.

Protection from such burns is achieved merely by not being in the line of sight. Actually, 20 to 30 per cent of the fatal casualties in Japan were due to flash burns.

The second major cause of injury to people is from the collapse of buildings, glass and so on. If there are occupied premises over a considerable area and they all crumble down, a lot of people are killed and injured as a result.

The third effect, and one which has been somewhat overrated in terms of its severity, is the effect of nuclear radiation. Actually, under the assumed conditions of a bomb at 2000 feet, the lethal radius of the nuclear radiation is about 4200 feet. Protection from nuclear radiations is obtained from a thickness of concrete or any substantial material. The ground is a fine shield and a subway, for example, is a safe place.

Actually, all these other things, the fire, the building collapse and so on are so severe up to 4200 feet that the nuclear radiation becomes a

kind of secondary cause of injury and death. It has been said that in the Japanese experience, people died from about three causes, and it was hard to identify which was primarily responsible.

To summarize in a quantitative sense what this destruction means, from the point under the bomb burst, which is called the "ground zero," there is virtually complete destruction out to a radius of half a mile, corresponding to an area of about three-quarters of a square mile. In this area at least, on the Japanese basis, there will be about 85 per cent mortality. Severe damage, which is defined as major structural damage that would result in collapse of buildings, will occur out to a distance slightly over one mile. This corresponds to four square miles, and in this total area one could expect about 30 per cent mortality. The third, moderate damage, which is short of major structural damage but which will require substantial repair for reuse, will extend out to about one and a half miles, which is an area of about eight square miles.

Then, grading it off still further, there is partial damage up to about two miles, adding another four square miles of damage area. Light damage will extend to a radius of eight miles. If you drew a circle from where we are with a radius of eight miles, it certainly would include an awful lot of windows which would be shattered.

The effects on different types of structures are worth mentioning briefly. Wood frame structures are usually distorted and collapse if they are in either of the first two zones or perhaps the third. Masonry buildings, and there are a disturbing number of masonry buildings on Manhattan Island, are very likely to collapse, because of the distortion and twisting that causes the supporting members to give way. Reinforced concrete buildings stand up better than anything else. These, also, if they are close to ground zero, are pretty well blown out and usually gutted by fire, but the structure itself will stand better than anything else. Steel frame buildings, usually, if they are very close, have their sidings ripped off. Depending upon the ruggedness of the siding,—whether it will give or not—the structure is frequently twisted beyond use.

Again, taking the Japanese figures, in Hiroshima, the density of population was 35,000 per square mile. The area destroyed was 4–1/2 square miles, which corresponds approximately to the severe damage

area mentioned before. 70,000 people were killed, 70,000 were injured and the mortality per square mile was 15,000.

In Nagasaki, where the topography was very different, the density of population was higher, 65,000 per square mile. The destruction was just under two square miles, and the mortality was 36,000 or 20,000 per square mile.

The correlation between the effects in Japan and those which might be expected in London, for example, were studied by the British mission that went to Japan after the war, and they concluded that in a typical British city, such a bomb would have caused complete collapse of normal houses out to a distance of 3000 feet, damage beyond repair to a mile, and damage uninhabitable without extensive repairs out to about 8000 feet.

These are general numbers and qualitative descriptions of what happens when one of these things goes off.

In relating their effects to New York City I really cannot improve on an article which was published in August 1950 by John Lear in Colliers, which many of you may remember reading at that time. It is called "Hiroshima, U.S.A. Can Anything be Done about it?"

This was published shortly before the Atomic Energy Commission and the Department of Defense published a handbook, so called, on the effects of the atomic weapons, which is a substantial volume, all unclassified. I might say all of the needed information in this field is unclassified.

Clearly, the Colliers article is written in a dramatic style, but in general, checking the scale and character of the effects which the author describes, they seem to be fairly closely in accord with the results which one would predict from the Atomic Energy Commission book.

Lear's assumptions were these: that there was a surprise attack on Manhattan Island at about five o'clock one summer afternoon on a week day, that the ground zero point was Houston Street and Broadway, and he used our nominal atomic bomb at 2000 feet.

The results which he describes seem to me fairly reasonable to expect. You can pick any ground zero point and I use his because his description is based on it. The streets were blocked and traffic movement halted over most of the lower half of the island below 46th Street,

subways being the only means of immediate access to the area. An area 15 blocks long from Canal Street to Tenth Street, and 20 blocks wide, from Avenue B to Sullivan Street, were completely destroyed.

As to gross effects, the floor of Brooklyn Bridge collapsed. The Woolworth Tower toppled and burned. The south face of No. One Fifth Avenue was ripped off. The Manhattan and Williamsburg Bridges were closed by burning cars. The ends of the Holland Tunnel were closed by debris. The Brooklyn Navy Yard was set afire, and docks from Hoboken to Brooklyn were ignited. The rather heavy damage on the island extended from Wall Street to the Empire State Building.

He predicted that a fire storm followed, which burned for about three days and consumed much of the central portion of the island from Brooklyn Bridge to 23rd Street. He estimated 180,000 deaths and a damage of billions.

I think this is not an exaggeration. He assumed a surprise attack. To the extent that warning is given and there are shelter areas for people to go to and there is time to get to them, the loss of life would be substantially diminished, perhaps cut in half and perhaps more, depending upon how complete the sheltering and time available. The physical destruction would not be materially different, the main purpose of warnings being to save life.

Mr. Lear went on to describe the general state of chaos which resulted, the exodus of millions of people from the area of New York. Certainly the fear of further attacks, which would be a profound factor in everyone's mind, would greatly affect the rehabilitation of New York as a place in which to do business.

The preparations to meet such a disaster fall into several categories. First, the things you can do to diminish the probability of surprise attack. These lie with the armed forces, with the volunteer corps, with the radar warning system, fighter aircraft and so on. These are certainly intended to diminish the probability that an attack can come without warning. At the same time, it is in no sense a cordon to insure against aircraft coming through. It is no such assurance.

Then there is the second category of measures, largely found under civilian defense, which are primarily aimed at coping with the disaster if it should come. This is an appropriate role for civil defense activities and a vitally important one. It involves the corps of volun-

teers and civil employees, designation of shelters, practice drills, first aid training, blood banks, traffic movement, utilities, and the like,—the kinds of things which you have been reading about in the papers for the last year and a half or more and on which I am sure significant progress has been made. It is uphill business, though, because it is difficult to get people to face these questions.

Third, there are the things that one can do to diminish the effects, and these lie in several areas. Clearly, the atomic bomb is properly called a weapon of mass destruction. It is most effective where there are high densities of targets, whether it be people or factories or whatever it may be. This obviously means that dispersing is the most certain step to diminish the effects of an attack.

Dispersal is a complicated subject. The probability of a high degree of dispersal in advance of an attack is low. The reasons for people congregating in such densely populated places as Manhattan seem to be so much stronger and so much more in people's minds than the reasons for dispersal, that I think the tide is still in the direction of concentration.

There are things that could be done to diminish the amount of the effect on exposed areas. For example, there are quite a few things that can be done in building design which will diminish the vulnerability of structures to these effects. Very little, as far as I know, has been done in this field, and I might say that the Government has not set any pattern in this field in either the decentralization move, the dispersal move or in the design of buildings which will have a measure of resistance to atomic bomb effects.

There are zoning and building codes which again would be a result of decisions by various authorities on this subject, and I am not aware that anything has been done along this line.

I neglected to mention that in the Japanese case, they had had the 1923 earthquake, and after the earthquake they set up a severe code for building design which resulted in a substantial degree of earthquake resistance in the structures they built, which is very much higher than that which characterizes most of the structures in this country. As a result buildings that were substantially built in Japan had a degree of resilience which was greater than most of the structures you would find in this city.

There is another point in connection with dispersal, and that is the

role of employers. The employers' places of business determine where people work and live and I should say that until those employers who have the latitude to decide where their offices will be, rather than being constrained to operate in one place, decide that it is in their interests to move their headquarters elsewhere, people will go on working and continuing to work and live in areas such as Manhattan.

This is a general description of the way these things stand in the seventh year of the Atomic Age. There is no question but that the effects of even one of these bombs on a city such as this would be enormous. Certainly, the effects should not be such as to diminish either the will or the capability of the city and the nation to pick things up and get back to work. At the same time, the character and scale of the confusion and dislocation which will follow would be collossal, and it seems to me that lawyers, and the Bar Association in particular, are in an especially favorable position to do some thinking and planning and to take action to diminish the degree of dislocation that will follow, because in times of trouble, both individuals and institutions turn to legal counsel.

The burden which will fall on the legal profession in the event of such a catastrophe would be very great indeed, and absorbing the effects of such a disaster and reestablishing the fabric of business and individual relationships will require advance preparations by the Bar if it is to perform the vital function which it traditionally has performed for its clients.

MR. DAVID F. CAVERS:

I have endeavored in one of my unpublished manuscripts on this subject to get a phrase which would describe the role of the lawyer and why we should make this our concern along the lines which Mr. Wilson just referred to. Thus far my favorite phrase is that lawyers are experts in contingency. We are the class in the population which is charged by the rest of the society with worrying in advance about dangers to economic and social relationships in society.

It does seem to me that we have not as yet done quite as much collective professional worrying about this problem as is called for.

Mr. Wilson has given you a number of assumptions for his talk, which I am very happy to incorporate by reference. I would like, how-

ever, to point out one fact. Mr. Wilson and, indeed, most writers on this subject, for ease of analysis and to effectuate comparisons with the Japanese experience, which, fortunately, is all that we have, have used a single bomb dropping on a particular area to indicate the scale of the damage.

It does seem to me likely that if a target, such a rich target as Manhattan Island, were chosen by our enemy, they would be willing to earmark more than one bomb for the purpose.

I have been hopeful that in the studies which are going forward on this problem there will be indications as to whether the cumulative effect of a number of bombs deposited in succession or concurrently would be different in kind or in large degree from that of a single bomb.

*Business Centers as Targets**

Certainly, I find myself much in agreement with Mr. Wilson's evaluation of the attractiveness of New York and a number of other major centers as targets. I think we may have been distracted from appraising them adequately by the emphasis that has been placed on industrial targets.

Now, for an enemy which is seeking to register as rapid and major an effect with a limited supply of atomic weapons as is possible, it does seem to me that centers of commerce and finance represent a much more appealing target than the industrial establishment. The attack on the commercial and financial centers is like a blow on the ganglia of the nervous system. Its effect may be to create paralyzing disruption of existing economic and social relationships.

The objective of the proposals which seem to me worthy of exploration by lawyers in their associations that I would like to present this evening is to keep the economy running as efficiently as possible after attacks on such ganglia, to prevent the paralysis or to mitigate it, and along with that, another subsidiary, but nonetheless appealing objective, to cut down the avoidable individual distress that may result from the dislocations that would certainly occur in the event of an attack.

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* Headings have been added to Professor Cavers' remarks in preparing them for publication.

I think it is important in appraising these dislocations to recognize that, even though attacks were made on a rather large scale and a number of targets were chosen, still only a small fraction of the whole country would be hit. There would not be a great climactic cataclysm in which the United States would blow up in one grand blast. The bulk of the country would be untouched by these attacks, in the sense of being completely free from physical damage, so that you have the very perplexing problem of conducting the business of the country and carrying on a major war, with a part of it badly damaged and the rest of it, as I say, physically untouched.

However, the freedom from physical damage which the bulk of the country would enjoy does not mean that it would be free from economic repercussions and, therefore, for this subject, we cannot think of the problem as being confined to New York City or the major seaboard centers, or those plus Chicago and a few others. It is a problem that would have its repercussions throughout the nation. The effects would be perhaps something like the effect of throwing a pebble in a pond. They would go out in a succession of waves.

The Nature of Our Economy

One more general observation, and that is that the United States is a free enterprise economy and a credit economy, a system which operates by individual free initiative, by and through firms which are dependent in their daily operation on the giving or the receiving of credit.

That in many respects produces, it seems to me, a much more sturdy economy, an economy much more able to resist certain types of attack than a monolithic state-controlled economy. However, it is an economy which depends on the maintenance of the nervous system of relationships, economic and legal, that are knitted together in normal times by a vast flow of transactions through the very centers that would be attacked. Note, too, that it is an economy that the Government cannot possibly take over.

For a period of some years I was involved in an attempt on the part of the Government to deal very directly, but still not operatively, with one part of the economy, to wit, the price function of the economy. I assure you that the difficulties in the treatment of that

one particular branch of the economy by regulation indicates how utterly impossible it would be for us to rely on the Government's taking over our economy.

After all, who is the Government? It is a collection of people who are already quite busy, who would be still busier in the event of a war, and who might lose a considerable part of their manpower in the event of attack. But even if intact, those people would be utterly unable to do this job. What we now must think of is how we can continue to operate through the private individuals and the corporations which at present are running the economy of the United States. Incidentally, we are not concentrated for this purpose to nearly the same degree as either Japan or Germany was, a factor which makes our problem in some respects more difficult.

Problems Excluded

Now, in talking about this problem of how to develop legal relationships which will sustain and survive attack or will minimize the effects of attack, I am excluding a good many exceedingly relevant and important matters. In the first place, I will have nothing to say about the problems which Mr. Wilson has spoken about or the Civil Defense activities, fire-fighting, evacuation, health and safety measures and the like. I will have nothing to say about the operation of the Federal, State and local governments or units and their functioning in such emergencies or their efforts to maintain regular operation. I will, to be sure, have something to say about the court system but not the executive branch of the Government generally.

Obviously the effectiveness of that has to be posited. You have to assume that the Government is able to carry on reasonably well the basic functions which the Government performs. Otherwise, the matters that I am dealing with are not likely to be very relevant. It may be, of course, that the Government would not be able to perform its usual functions in the area immediately under attack, but our problem, as I indicated a moment ago, extends well beyond that immediate area.

The problems of compensation for war damage to property, of indemnity to people who are injured or the dependents of people who are killed, the problem of making income payments to take the

place of the incomes that are cut off, the problem of restoring our productive facilities that are damaged, all those problems have been dealt with, I would say in a fairly rudimentary fashion in S–1848, the Frear Bill, which is now in the Banking and Currency Committee of the Senate. All those matters I am passing over although they are closely related to the subject that I am going to speak about, and the reason I pass them over is the fact that the matters I am excluding are the matters that have been most obviously requiring attention, although certainly they have received surprisingly little.

The matters that I would like to speak about, though in a very sketchy fashion, have not been given much attention by anyone in this country as compared to countries abroad, although they have never faced abroad the kind of hazard that we now confront here.

I have developed the areas for consideration into three general categories: business problems, estate problems, and problems in the operation of the Judiciary and Bar.

Corporate Management

Under the category of business problems, I think one of the most perplexing is the problem of maintaining business management when there have been very heavy personnel losses on the part of the corporate executives and directors, and possibly shareholders. There is a problem where I think some useful prior planning can considerably minimize the difficulties.

I suspect many firms have been advised by counsel with respect to the division of responsibility in the firm, the extent to which the powers that are normally vested in the principal officers can be shared with other officials located in less vulnerable spots, but there are many corporations in major centers where the officials are concentrated in a target area and are likely, in all probability, to be there in the event of surprise daytime attack.

If those officers were to be casualties or were to be disabled and unable to carry on, perhaps the thought would be to have a meeting of the Board of Directors for the election of substitutes or successors. But how about the problem of a meeting of the Board of Directors if the Board of Directors had sustained the same losses?

That might suggest the possibility of shareholder meetings, but

you may find that the shareholders are with the directors, and the problem of determining the succession to their interests is a problem of great difficulty.

The ordinary mechanisms, in other words, for assuring the succession of responsibility in a corporation, particularly the smaller corporations where shareholding is limited, is a problem which calls for early consideration.

It seems to me that one possibility, and this may in some jurisdictions require amendments to corporation statutes, would be to provide for action by much smaller numbers of the directors than are normally authorized to take action.

Another possibility seems to me to be to make provision for the creation of voting trusts, which would come into being immediately upon the disaster and without formality, so that automatically, in the event of the extinction of members of the Board of Directors and of shareholders, the responsibilities for carrying out the corporate action could be exercised by trustees who could be adequately distributed in the country so that the likelihood of their extinction would be greatly minimized.

Long-term Contracts

Another group of problems, a very diverse group, I have roughly indicated under the heading of "long-term obligations other than the obligation to pay money," such as requirement contracts, supply contracts, long-term employment contracts, long term leases, and long-term patent licenses, to mention only a few. Those are likely to be subject to considerable stress.

Perhaps when one thinks of those, one immediately says, "Well, impossibility of performance," or refers to *force majeure* clauses. In the first place, we have got to consider that, in a good many situations, performance will be possible in the sense that there will be no physical impediment to the discharge of the contract obligation. It will simply become extremely unprofitable.

There may be some situations where a sort of rationing system would be necessary which would, in one sense, prevent performance, but not in the legal sense of impossibility.

Another consideration is whether it is wise to think in terms of

disrupting and breaking off contract relations in the event of an atomic attack, actions which would make the normal conduct of affairs impossible. Provisions for this might themselves be a disrupting influence on the economy. Perhaps it would be better that provisions for, you might say, built-in resiliency be conceived, contract provisions which would endeavor to permit the continuation of the relationship in modified form. As I think Mr. Oberdorfer will tell you this evening, efforts to that end are to be found in both the English and the German laws, provisions which they developed when they were seeking to cope with their analogous problems.

The problems of the leaseholds will obviously open up many difficulties. One can think of a rather impressive form of constructive eviction in many situations, but in addition to that one must also think about the situations where there will be no physical damage whatever; the leasehold will simply become highly unattractive in terms of its economic potentialities.

Credit Problems

A much wider, more obviously acute area, is that of creditors' rights, and here one thinks first, I suppose, of moratorium measures. I think we need a good deal more thinking directed to the problem of moratorium measures. Among the areas that would call for moratorium measures are some where you could figure out in advance just what kind of protection would be needed. But to try to run a credit economy with everything under a moratorium would produce simply a rather different kind of chaos, one made by us instead of by the enemy.

However, we have got to realize that there will be a vast number of firms which will be unable to pay their debts as they mature if we become the target of atomic attacks on centers of commerce and finance, and these inabilities will spring from a number of sources.

One of them, of course, is the damage to plant buildings and inventory. Another is the loss of accounts receivable. A garment manufacturer upstate or a textile mill in a small New England town would have a lot of good accounts receivable one day and a lot of bad debts the next.

The problem of availability of bank deposits is something which I

think the banking system can work out if it secures sufficient cooperation from the Congress. Whatever might be done as to this, it seems to me we would in all probability go through a period of interrupted credit. We would have a bank holiday, whether as short as the last or a much longer one I am not sure, but there would be a period when bank deposits would probably be hard to get at. Current orders would suddenly fall off.

And, finally, there is a problem that I think is rather more widespread. It springs from the fact that a great deal of the indebtedness of this country is subject to clauses which allow the creditor to accelerate maturity if he becomes, shall I say, uneasy. Now, certainly I could think of few more occasions for uneasiness than the succession of atomic attacks which we have been postulating. Hence a great many obligations would mature.

Note that all of these possible sources of inability to pay debts as they mature, save the first, may occur anywhere in the country. It is not simply a hazard that springs from physical damage. That is only one of a number of sources.

Given that type of situation, it seems important to me that we find streamlined and simplified ways of getting clear of the past obligations, so that fresh credit can be extended. Some of this can come from Government sources, but I do not think we should be forced to calculate on a nationwide R.F.C. type of operation.

It was suggested to me by a gentleman with whom I discussed the problem that the thing to do would be to go down to the Federal Court and have an officer of a corporation in this embarrassment named receiver. I do not know whether the problems of selecting the disinterested trustee, if you were in a Chapter 10 situation, would become difficult in these circumstances, but the problem that worries me most is: Where is the Federal Court? Where is the Federal Court for the Southern District of New York? Well, obviously it would not be in the place where it now is. And how many thousands of such cases would it suddenly be called on to handle?

In order to meet this type of situation, there must be a method of decentralizing judicial administration and also, I think, developing a simplified mode of procedure in connection with it. I think we have also got to reduce the degree of economic democracy that we practice, the town meeting arrangement whereby the creditors or the share-

holders or the lienholders are polled. I suspect this may have to be put into abeyance for a time.

There is another problem that worries me. Noting that our banks have everything conceivable on microfilm, I still wonder how they are going to discharge the problems that they would be assuming as trustees under indentures, when you consider the vast number of new problems that would arise for them in that role, and the likelihood that among the victims of the attack would be a good many of the officials who would normally discharge those responsibilities and the counsel who would normally advise the bank people.

Property Problems

In the field of property law and property insurance, I think we have a good many problems of proof of ownership that would present themselves. This overlaps the estate field. We have problems, of course, in land titles, the proofs of accounts and deposits, and so forth.

Basically, however, the property problem strikes me as being a problem in compensation. It ties in, therefore, with the war damage compensation problem, and that calls for solutions which would have an important bearing on the management, credit and estate problems.

I think, however, that thus far the compensation for property problem has been conceived unduly in terms of giving compensation for plant that has been destroyed. Quite as much needed, it seems to me, are ways of providing working capital in order that we will not be in the predicament of offering a nice new artificial limb to a dead man or a dying man.

In the field of estate problems, we do not have perhaps quite as direct a relationship to the conduct of the war as we have in the field of business problems, but I think that the morale of the society and its efficiency will be very directly affected by the success that we may have in working out modes of handling some of these problems.

Consider, for example, a grim picture: 10,000 propertied widows in the environs of a large city descending upon their sons-in-law and family attorneys and brothers-in-law, trying to get the estates liquidated to the point where they can enjoy some of the comforts that they have been used to. I think they collectively could constitute a considerable drag on the war effort.

The estate problem, as I see it, falls into two broad categories. The substantive problems seem to me to emerge mostly from the drastic change in expectations which atomic attacks of the sort postulated could make.

The Impact on Estate Plans

We have been working out estate plans on the supposition that certain property arrangements will persist, certain expectations as to mortality will be realized, and also in that planning we assume that, if there are changes, the testator and his counsel can get together and make appropriate provision for them. Such bodies of law as that growing around lapses and ademptions are due largely to the careless testator rather than to the well-advised one.

But here we run the risk of very drastic alterations, both in the property expectations and in mortality and survival expectations of testators. We face possibilities of several members of a single generation in a family being wiped out, the likelihood of particularly heavy losses among the breadwinners of the family, and so on, if the daylight downtown attack is chosen. The property alterations are obvious and numerous.

Now, what can we do about it? I think one thing we might do is to take heart from the experience of our predecessors in the—was it the 15th Century?—in the Wars of the Roses, when there were a great many changes in expectations which came about rather rapidly through mistaken political judgments on the parts of certain property owners. The lawyers developed then the institution of the use, the shifting and the springing use, many times employed to minimize the hazards of those political miscalculations.

I think that we could find a much wider use for powers in situations of the sort which we are contemplating, to invest individuals located in less vulnerable areas with much more extensive authority than one would, under normal circumstances, ever dream of giving, powers to rearrange the estate plan after the atomic attack and the death of the testator. Guides for the exercise of this discretion could, of course, be given.

In this technique of testamentary powers, it seems to me lies the possibility of working out from the substantive upsets which might easily come about. I think there might also be legislation which would

give to the courts some authority to move away from the testamentary plan if the testator has not specifically negatived the exercise of such authority. We have analogies for this in the case of the treatment of the pretermitted heir and of the widow's election.

I think there is a considerable likelihood of being able to meet these problems if a bold course were taken by testators—and that means by their advisers.

The Administration Problem

In the estate administration problem, you have, it seems to me, an almost desperate situation. Surrogate Courts would have a burden thrust upon them vastly larger than they normally have to handle, and they themselves might be among the victims of the attack.

Obviously there is need for standby plans for distribution of that business geographically, and I think the present state lines should be disregarded. That means, of course, some interstate planning, but I think it could be worked out.

From the standpoint of the lawyer, one of the most important elements in the problem is the provision of appropriate substitutes for representatives and trustees, and of giving them much greater freedom of action in the handling of securities and of property generally than would normally be the case.

In the case of the corporate trustee, I grow worried again, as I did in the case of the corporate trustee under indentures, as to whether the concentration of demands would not overtax the staffs that were available. I wonder whether one of the possible ways of meeting that situation would be to make provision for the pooling of investments. In other words, common trust funds might become the rule rather than the exception in the event of sudden attacks creating administrative problems of a vastly greater magnitude than the companies have had to face.

Looking at the common trust fund provisions which happen to be in close juxtaposition to the State Defense Act in McKinney's, I was struck by the elaboration of the machinery for the triennial accounting. I hope no common trust fund will encounter a triennial accounting just after or soon after an atomic attack. That type of careful notice provision, which is so apt in peacetime, is one of the things that I think we would have to sacrifice in a period of emergency.

Tax provisions would have to be made more flexible, and I think much more consideration ought to be given to the problem of guardianship of the person. With the hazard that there would be many more orphans than we are accustomed to have to worry about in this country comes a greater need of making provision in instruments for the care of orphaned children.

The Judiciary and Bar

With respect to the organization of the Judiciary, I think a few of the things that I have said thus far indicate some of the problems that the Judiciary would be up against.

I think that obviously we need to relax our ideas as to venue and as to notices. Provision should be made for the removal of records and for the development of standby relationships between existing courts in target areas and courts outside target areas.

I think provision should be made for a much larger number of auxiliary officials. That has to be done in some way that does not make each court a bottleneck for the work of its auxiliary officials. The normal processes of appeal would, I think, have to be cut down.

With respect to the Bar itself, aside from the obvious suggestion that many have already anticipated of providing deposits for files, there ought to be some provision made for people who are able to use those files effectively.

If you assume a possible loss of a third of the active personnel of the Bar in the major centers, I think you should also assume about a one thousand per cent increase in the work load. Now, on that assumption, what is going to happen? The process of administering the functions of the profession—incidentally, working through microfilm with a dubious supply of readers—presents a very grim picture. The only solution that has occurred to me is the development of a new relationship in the law, that of a standby correspondent.

I think around the countryside, in the smaller communities, we have a great many lawyers who would be competent in a pinch, if they had been kept in touch with the developments of the particular client's affairs to a limited degree, to carry on and to extend their facilities to the dislocated and displaced members of the Metropolitan Bar. They would enable the work to go ahead with a minimum of—well, "minimum" is not a very good word to describe the amount of disrup-

tion that would still remain. I do think, however, that this reorganization of the legal profession after an attack would be one of the most important steps in rehabilitation and that a great many of the difficulties could be taken care of by appropriate advance arrangements.

I am sure that I have raised more questions than I have answered, but that was one of my major purposes.

MR. WILSON:

I might say that I failed to make reference to the map over there (indicating). I did not have an opportunity to spot on it the buildings such as the Surrogate's Court, etc., that would disappear in my theoretical attack on New York, but I think you can readily identify their locations.

I might make one comment on a point that Dean Cavers raised. That is the effect of multiple attack.

The case of one bomb on one city is a great simplification of what presumably would actually occur. Certainly, no nation would engage in this kind of a business which did not have a substantial supply of these things. The effects of the first attack would be perhaps the most fruitful for the attacker in the sense that defensive measures would be least alert and damage to the population, density of people, and so on would be greatest at the time of such an initial attack.

The effect of a group or a number of bombs, either simultaneously or in succession on a large city such as New York would multiply the chaos which obviously would result from one. If they were successive and spaced in any reasonable time relationship the effect of successive bombs, at least on loss of life, might be substantially less, because I would suppose that one of the major factors and problems resulting from such an affair would be the exodus of people, people going where they would not know, but certainly the migration out of regions of high density one could expect to be high, whether they knew where they were going or not.

If successive attacks then came along, presumably the density would be diminished somewhat by the refugees who had left the area.

The case of one bomb on one city is clearly an over-simplification.

Gangsters in the Guise of Jurists

By Dudley B. Bonsal

"Gangsters in the guise of jurists" was the appellation given by one Communist East Berlin newspaper to the International Congress of Jurists which was held in West Berlin during the last week of July. The "gangsters" were a representative group of some 150 lawyers and judges from 43 countries. They had come to learn about the administration of justice behind the Iron Curtain. The "gangsters" who came from the United States included the President of the American Bar Association, a former President of that Association and a distinguished Professor of Law of Columbia University.

The International Congress of Jurists was sponsored by the Investigating Committee of Free Jurists, which has been operating in West Berlin for several years under the direction of Dr. Theo. Friedenau. Most of the Committee, including Dr. Friedenau, are lawyers who took refuge in West Berlin because they could no longer endure the Russian dominated Communist dictatorship in East Germany, the so-called German People's Republic. While East Germany was theoretically under the same system of law as the rest of the country, they found that the Communist regime was systematically destroying the rights which that system guaranteed to the people. The fact that these men are refugees indicates no lack of courage on their part. Quite the contrary. In setting up the Investigating Committee of Free Jurists, whose purpose is to expose the injustices practiced in Communist Germany, the Committee has earned the lasting hostility of the Communists. The Communists have placed a substantial price on Dr. Friedenau's head, and one of his leading associates, Dr. Walter Linse, was the subject of a sensational kid-

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Editor's Note: Mr. Bonsal, the Chairman of the Association's Committee on Foreign Law, and Professor Paul R. Hays of Columbia University School of Law, were asked by the President to represent the Association at the International Congress of Jurists.

napping in early July when he was seized in West Berlin and speeded across the line to an unknown fate in East Germany.

Dr. Friedenau and his associates have much the same conception of the freedom of the individual which we in the United States hold sacred. They found that this conception, while guaranteed by the law of the land, was being systematically eliminated in East Germany by the Communist regime, with the backing of the Russian army. They found in West Berlin, itself well behind the Iron Curtain, an outpost from which they could expose the injustices committed by the Communists. From this point of vantage they enlisted the aid of citizens of East Germany who believed as they did and who were willing to carry on the fight within their own communities. This membership has grown to 2,000, drawn from all walks of life, who keep the Committee informed as to violations of German law involving the deprivation of life, liberty and property in their communities. These are publicized by radio and pamphlets in the area where the violations occurred.

In cases of the more serious offenses, the Committee draws up an indictment in the German form, specifying the German statutes which have been violated. These indictments are lodged with the Ministry of Justice in West Germany, to be acted upon should the offender later be apprehended, and copies are widely circulated in East Germany.

While this activity has not of itself brought about a change in East Germany because of the ever-present Russian army, it has done much to preserve the spark of freedom there. This activity has been a deterrent to those in political and judicial authority who would otherwise give complete obeisance to their Communist masters. Since violations of human rights are publicized by the Committee and reported to the authorities of West Germany, the offenders know that some day they will be called to account.

The work of Dr. Friedenau's Committee has received wide attention in the press throughout the free world. Here was a group of lawyers who, at great personal sacrifice and danger, were

seeking to preserve civil liberties guaranteed by German law by exposing the efforts of the Communists to destroy them.

About a year ago Dr. Friedenau and his associates decided to consult lawyers and jurists in other parts of the free world to obtain their opinion as to whether the activities of the Communists violated German law and the United Nations' Declaration of Human Rights, which Declaration had been solemnly entered into by substantially all the members of the United Nations, Communist and non-Communist alike. Such was the origin of the Congress of Free Jurists.

Dr. Friedenau invited leading lawyers and judges throughout the free world to meet with his Committee in Berlin last July. Among others attending from the American Bar Association were Mr. Robert G. Storey, who has since been elected President of that Association, and Mr. George M. Morris, a former President. The Association of the Bar of the City of New York was represented by Professor Paul R. Hays of Columbia University, and the writer. The Congress which met in West Berlin on July 25th was in a real sense a world conference. Representatives came from as far as Brazil, India, Japan and Korea. The Congress included lawyers from countries now behind the Iron Curtain who had had to seek temporary asylum in non-Communist countries. Among them were Albanians, Bulgarians, Czechoslovakians, Chinese, Estonians, Russians, Latvians, Lithuanians, Romanians and Poles.

All the delegates were given a thorough insight into the work of Dr. Friedenau's Committee. They also listened to testimony given by witnesses who had come from East Germany for the purpose. The Congress, under the chairmanship of Mr. Justice Thorson, of the Supreme Court of Canada, divided itself into four commissions—on Penal Law, Public Law, Civil and Economic Law, and Labor Law respectively. These commissions made detailed studies of the application of law in their respective fields in the Communist East Germany and reported their findings to the Congress on July 31st. All the commissions came to the

conclusion that human liberty as guaranteed by the law of Germany and other civilized countries and by the United Nations' Declaration of Human Rights was being systematically destroyed by the Communist authorities in East Germany, and that these violations constituted a threat to free peoples everywhere.

It was made clear to all of us that under Communist rule the judiciary is the first target for destruction. Judges, being drawn from the "people," do not have and are not expected to have, any knowledge of or training in the law which they are supposed to enforce. The only requirement is blind adherence to the wishes of their Communist superiors. Under such a system, of course, the legal profession, as we know it, cannot exist.

The Congress concluded that the work of Dr. Friedenau's Committee was entitled to the support of the lawyers in all of the free world, and to that end it established a Standing Committee, with headquarters at The Hague, and composed of the following members: Hon. J. T. Thorson, Chairman, Ottawa, Canada; Mr. P. T. Federspield, Copenhagen, Denmark; Sr. Jose Nabuco, Rio de Janeiro, Brazil; Hon. H. G. Tyabji, Karachi, Pakistan; Dr. E. Zellweger, Zurich, Switzerland; and Mr. A. J. M. van Dal, Secretary, The Hague, Netherlands.

The Communist authorities in East Germany sought in every way to minimize the work of the Congress. They took the occasion of the meeting in West Berlin to stage public trials in East Berlin, with the usual accompaniment of forced confessions and propaganda speeches in an effort to prove to the "Comrades" that Dr. Friedenau and his associates were traitors and that the visiting jurists were gangsters. The fact that they did so is eloquent proof that they fear having their activities exposed by the light of freedom. And what did the "Comrades" think about it? According to the Daily Wireless Bulletin, for August 1, published by the United States Information Service, "The swelling mass of refugees fleeing from East Germany into anti-Communist West Berlin during the last several days is now estimated by Western officials at about 200,000 men, women and children."

There is no question that the delegates to the Congress were deeply impressed with what they observed. One delegate, a distinguished leader of the Bar in his own country, who had come many thousands of miles to attend the Congress, said it was the greatest experience in his career. Certainly all the delegates though that Dr. Friedenau and his brave associates deserved the sympathy and support of lawyers everywhere in their exposure of injustice.

The lesson which we learned in Berlin should commend itself to every lawyer in the country. It points up once again that we must be ever vigilant to preserve our heritage of freedom. Only if we do so will the United States continue to be a symbol of hope to the peoples behind the Iron Curtain. This symbol is one of the greatest assurances of world peace.

Chief Justice Vanderbilt's "Cases and Materials on Modern Procedure and Judicial Administration" *

With his customary directness, Chief Justice Vanderbilt in the first two sentences of the preface to his new casebook on "Modern Procedure and Judicial Administration" states the rationale of the book: "In the overcrowded law school curriculum there is no time or place —nor should there be—for the study of any system of procedure but the best. The most effective and at the same time the simplest system of procedure thus far developed in our law is that set forth in the 86 Federal Rules of Civil Procedure and the 60 Federal Rules of Criminal Procedure." Thus, for the first time, the author says, the Federal Civil and Criminal Rules are presented together so that the student may study "the latest and most advanced system of procedure known to the common law" and use that system to evaluate and understand the procedure in his own jurisdiction. If he does this the Chief Justice is certain the student will "become an advocate of their acceptance elsewhere"—an effort "in which every lawyer should share and for which every law student should prepare."

Other reviewers will examine the casebook as a teaching tool although a glance at the table of contents will convince many practicing lawyers that those who use the book will profit in a very practical way from the Chief Justice's long career as a successful trial lawyer. The book's interest for readers of THE RECORD lies in its attempt to stimulate the interest of law students in what is the chief reason for the existence of Bar Associations: the improvement of the administration of justice. The Chief Justice is an old and experienced hand at this and it is profitable for all who try to encourage law students and younger lawyers to participate in the work of Bar Associations to note how the Chief Justice baits his traps.

Most law students believe, or perhaps are encouraged to believe, that the American Bar Association is only slightly more exciting than the Daughters of the American Revolution. In the second chapter, therefore, the Chief Justice introduces the A.B.A. in one of its more

* Cases and other Materials on Modern Procedure and Judicial Administration. By Arthur T. Vanderbilt. New York: Washington Square Publishing Corporation. 1952. Pp. xx, 1390.

exciting moments by reprinting Professor Wigmore's description of "the spark that kindled the white flame of progress," Roscoe Pound's famous "The Causes of Popular Dissatisfaction with the Administration of Justice." Then, there follows a chapter on court organization followed by a series of questions which, if the student answers, will convince him that in his own state perhaps the "white flame of progress" is not burning too brightly. It is also modestly suggested in a footnote to the questions that the student give the chapter on judicial administration a 'first reading.'

The chapter on judicial administration is found in Part II of the book which has chapters on judicial selection, jury selection, and the legal profession. It is in these chapters that the Chief Justice, out of his conviction and experience as one of the leaders in the movement for an improved judicature, presents with great skill the arguments for the adoption of those minimum standards of judicial administration that are "needed in a *practical* way to make our court procedure work in the twentieth century . . ." These chapters should be exciting reading for law students and they are a valuable source of information for Bar Association officers and committees working in these fields. It is these chapters that distinguish the casebook from others and leads one to hope it will be widely accepted. It should be noted that each of these chapters is also followed by a series of questions designed to force the student to compare his own jurisdiction with those jurisdictions, like New Jersey, where the standards have been accepted. Finally, the student is supplied with 31 maps which indicate graphically the crucial points of state practice.

One other feature of the book should be mentioned. In the appendix the Chief Justice reprints Maitland's "The Forms of Action at Common Law" and excerpts from Langdell's "A Summary of Equity Pleading." These permit the student to get some notion of the historical aspects of procedure, but the Chief Justice points out, "We must constantly keep in mind, however, that there has been more progress in this country in the law of procedure, and especially in the spirit in which it has been administered, in the last fifteen years than in the whole preceding century."

It is to the better understanding of this progress and spirit and to the need for younger lawyers to interest themselves in the continued improvement of judicial administration that this casebook makes so important a contribution.

PAUL B. DE WITT

Review of Recent Decisions of the United States Supreme Court

By Joseph Barbash and Robert B. von Mehren

NATIONAL LABOR RELATIONS BOARD v. AMERICAN NATIONAL INSURANCE COMPANY

(May 26, 1952)

Like the Wagner Act which it superseded, the Taft-Hartley Act provides that an employer commits an unfair labor practice if he refuses "to bargain collectively with the representatives of his employees." (29 U. S. C. ¶ 158 (a) (5)). Unlike the Wagner Act, the Taft-Hartley Act defines the term "bargain collectively," as follows:

> ". . . the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ." (29 U. S. C. ¶ 158 (d))

In the instant case the Supreme Court considered for the first time the meaning of the term "bargain collectively" as defined in the Taft-Hartley Act. The case concerned one phase of a decision by the National Labor Relations Board against American National: a ruling that independently of other aberrations it was guilty of a refusal to bargain when it demanded "as a condition to making a contract" a "management prerogatives clause" which read as follows:

> "The right to select and hire, to promote to a better position, to discharge, demote, or discipline for cause, and to maintain discipline and efficiency of employees and to determine the schedules of work is recognized by both union and company as the proper responsibility and prerogative of management to be held and exercised by the company, and while it is agreed that an employee feeling himself to have been aggrieved by any decision of the company in respect to such matters, or the union in his behalf, shall have the right to have such decision reviewed by top management officials of the company under the grievance machinery hereinafter set forth, it is further agreed that

> the final decision of the company made by such top management officials shall not be further reviewable by arbitration."

Since this clause excluded "from the area of collective bargaining" a number of "proper subjects for collective bargaining," the Board held that American's "insistence" on it: (1) was not "consonant with the good faith bargaining envisaged by the Act" and (2) entirely apart from any question of good faith, was a *per se* violation of the Act's bargaining mandate because it was in "derogation of the Union's bargaining rights." Therefore, the Board ordered American National to cease and desist from refusing to bargain collectively with the Union:

> "by insisting as a condition of agreement, that the said Union agree to a provision whereby the Respondent reserves to itself the right to take unilateral action with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment." 89 N.L.R.B. 185.

The Court of Appeals for the Fifth Circuit refused to enforce this section of the order. It held that American National's insistence on the clause (1) did not of itself violate the act and (2) when considered in the light of the Union's "steadfast" opposition to the clause, did not constitute a failure to bargain in good faith. The negotiations were prolonged by "steadfastness" on both sides rather than by any "general unwillingness on the part of the petitioner to negotiate a contract satisfactory to itself as well as the union." 187 F. 2d 301 (1951). The Supreme Court, on certiorari, affirmed the Court of Appeals, Justices Black, Douglas and Minton dissenting.

In an opinion by the Chief Justice the Court first stated that by writing in the "good faith" test and by providing expressly "that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession," Congress in the Taft-Hartley amendments to the Wagner Act intended to make clear that:

(1) "the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position"; and

(2) "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."

Applying these general propositions, the Court held that American's conduct with respect to the "management prerogatives" clause was not a *per se* violation of the Act. It found that similar "management prerogatives" clauses were common in collective bargaining contracts and observed that the Board conceded that an employer could lawfully "propose" such a clause. Since the Board may not "pass upon the desirability of the substantive terms of labor agreements," the Board is forbidden to determine that the employer may not "bargain" for that clause.

The possibility that employers might use management functions clauses

to evade their duty to bargain collectively as to all conditions of employment, including wages, did not justify treating as *per se* violations all bargaining for management functions clauses. The problem must be met "by application of the good faith bargaining standards of Section 8 (d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether."

The Court disposed of the good faith question—the Board's other ground—summarily. It concluded that the Court of Appeals had "correctly applied the statutory standard of good faith bargaining to the facts of this case." Nor would it reconsider the evidence, for the Supreme Court "is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair minded judges could find it tilting either way."

The dissenters, Mr. Justice Minton writing the opinion, charged the Court with permitting easy avoidance of the bargaining obligations imposed by the Act. The record was "replete with evidence," Justice Minton asserted, that American National had "refused to reach a settlement unless the Union accepted the clause". Thus he concluded that American National had told the union "that the only way to obtain a contract as to wages is to agree not to bargain about certain other working conditions." To do this is to refuse to bargain about "those other working conditions," and a refusal to bargain about such working conditions violates the Act, regardless of good faith.

Although the majority did not dispute the dissenters' recital of the facts, the significance of its opinion is somewhat blurred by its failure to say anywhere in its statement of facts whether it accepted the Board's finding that American National "insisted" upon its proposal "as a condition" for execution of a contract. The majority said no more than that the clause was "an obstacle to agreement," and that American National had "bargained" for the clause. Nevertheless, the majority could hardly reject the conclusion of the Court of Appeals that American National was at least "adamant" and did "insist upon" the clause. Moreover, the order which the majority held unenforceable applied only if American National were to insist on a "management prerogatives" clause as " a condition of agreement." Finally, the majority must have had in mind at least adamancy when it said that "the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position." It would appear, therefore, that when the Court used the term "bargained" it was both describing more palatably what the Board called" insisted upon" and also concluding that "insisting upon" in good faith is equivalent to "bargaining" in good faith.

If the Court does indeed equate insistence with bargaining, the question for the Board in these matters will always be one of good faith, with the probable exception of insistence on a contract term specifically forbidden by the Act. With an easy *per se* pigeon-hole closed up, the Board's job be-

comes more difficult and properly so. By the same token, the responsibility of the Courts of Appeals is increased, with the expansion in their review power under *Universal Camera v. NLRB*, 340 U.S. 474 (1951) and the contraction of their reviewability on questions of fact under *Pittsburgh Steamship Co. v. NLRB*, 340 U.S. 498 (1951) and the instant case.

BROTHERHOOD OF RAILROAD TRAINMEN V. HOWARD AND ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

(June 9, 1952)

In *Steele v. L.&N.R. Co.*, 323 U.S. 192 (1944), the Supreme Court decided that the Federal courts must protect a non-union Negro railroad employee against discriminatory treatment in response to pressures by an all-white union, the exclusive bargaining agent of the Negro's craft. In the instant case the Court extended the *Steele* decision to protect a Negro railroad employee, Howard, who was not a member of the craft represented by the pressuring all-white union and who belonged to another union.

For many years Howard had been employed by the Frisco as a "train porter," a class which consisted entirely of Negroes and which had approximately the same duties as an all-white class known as "brakemen." The sole difference between the work done by the two classes was that five percent of "train porters" duties consisted of aisle sweeping and helping passengers off and on trains, which "brakemen" did not do. "Brakemen" were represented in collective bargaining with the Frisco by the Brotherhood of Railroad Trainmen, an all-white union. The "train porters" were represented by an all-Negro union.

By threatening a strike the Brotherhood forced the Frisco to sign a contract providing that "train porters" were no longer to do any work "generally recognized as brakemen's duties." Since the Frisco found it economically unfeasible to employ the "train porters" unless they performed those duties, it abolished all "train porter" positions and fired Howard, together with other members of his group.

Howard then sued in a Federal District Court alleging that the Brotherhood had forced the Frisco to "discharge the colored 'train porters' and fill their jobs with white men." He argued that this "discriminatory action" violated his rights under the Railway Labor Act and the Constitution. The District Court held that because the Brotherhood was not the legal bargaining agent for the "train porters," it owed them no duty of representation and therefore the *Steele* case did not apply. Thus the matter was within the exclusive jurisdiction of the National Mediation Board and the National Railroad Adjustment Board, 72 F. Supp. 695 (1947). The Court of Appeals reversed, 191 F. 2d 442 (1951). The Supreme Court granted certiorari, and affirmed the Court of Appeals, the Chief Justice and Justices Reed and Minton dissenting.

The Court found, in an opinion by Mr. Justice Black, that although "train porters" might properly be classified as other than "brakemen" and were in fact so classified, the *Steele* case "points to a breach of statutory duty by this Brotherhood." The general proposition for which the *Steele* case stands is that the Railway Labor Act "prohibits bargaining agents it authorizes from using their position and power to destroy colored workers' jobs in order to bestow them on white workers." There was such "an unlawful use of power" here, for: (1) The agreement with the Frisco "abolished" the job of "train porters"; and (2) Because of their color alone such porters could not be reemployed as "brakemen".

Since those threatened by "unlawful use of power granted by a federal act" may seek protection in the courts, the district court had jurisdiction. The doctrine of primary jurisdiction of administrative agencies does not apply, for "no adequate administrative remedy can be afforded by the National Railway Adjustment Board or Mediation Board," the two agencies administering the Railway Labor Act. The Adjustment Board can give no remedy because the claim does not involve interpretation of the "meaning" of a bargaining agreement, but rather determination of its "validity." The National Mediation Board cannot settle the dispute because the question is not one of proper "craft classification" of the porters: the discrimination practiced is unlawful however the colored employees are classified.

Finally the court held that for reasons stated in *Graham v. Brotherhood of Firemen*, 338 U.S. 232, 239–40 (1949), the Norris-LaGuardia Act did not bar an injunction, and that the district court should enjoin the Railroad and the Brotherhood "from use of the contract or any similar discriminatory bargaining device to oust the train porters from their jobs."

Justice Minton, writing for the dissenters, disagreed with the majority's interpretation of the *Steele* case. All that *Steele* case decided, in his view, is that a railway union must "act on behalf of all the employees which, by virtue of the statute, it undertakes to represent." Thus the Act forbids racial discrimination by a bargaining representative against its principals only because it forbids all such discrimination.

The majority here, Justice Minton charged, by "sheer power" has laid down something like a code of Fair Employment Practices for railroads. The railroads and the railway unions are "private parties," and although neither "a state government nor the Federal Government" may discriminate "on the ground of race," before the decision in the instant case there was no applicable federal law which . . . [said] that private parties may not" so discriminate.

The only question arising under the Act, Justice Minton concluded, was a "dispute between employees of the carrier as to whether the Brotherhood was the representative of the train porters." Since this was a question for the National Mediation Board, the case should have been dismissed as "non-justiciable."

If the instant case had reached the Court before the *Steele* case, it would

have been difficult, as the dissenters suggest, to find any language in the Railway Labor Act on which the Court could have based its decision. And the Court here relies on the similarity in the practical effect of the union pressures in both this case and the *Steele* case, rather than on any language in the Act.

It is interesting that the Court chose to base its opinion on this shaky statutory ground, rather than on the Constitutional ground also urged by Howard. Even the dissenters acknowledge that the Federal Government, like the state governments, may not discriminate because of race. Once this is extended, as it was by *Shelley v. Kraemer,* 334 U.S.1 (1948), to hold that government may not assist private persons to discriminate, it might well follow that private persons should not be permitted to use government-backed pressures for racially discriminatory purposes. Such a holding would be based on the Constitution, however, rather than on the specific statute, and the decision would necessarily be much more far-reaching than one with a statutory basis. Even so, the decision will probably have an effect beyond the Railway Labor Act. It is likely that what is "unlawful" under the Railway Labor Act, although not specifically spelled out in that statute, will be held similarly unlawful under the Labor Management Relations Act.

BESSER MANUFACTURING CO., ET AL. V. UNITED STATES

(May 26, 1952)

The United States brought a civil antitrust action against the Besser Manufacturing Co., Jesse H. Besser—president of the Besser Co.—and one corporate and two individual defendants. The defendants were charged with conspiring to restrain and monopolize interstate commerce in concrete block-making machinery in violation of Sections 1 and 2 of the Sherman Act and with monopolizing and attempting to monopolize the same industry in violation of Section 2 of the Act.

After a trial, the Government's charges were found to be clearly proved and a judgment designed to correct the defendants' abuses of the antitrust laws was entered. 96 F. Supp. 304 (1951). This judgment included various provisions intended to destroy the control over the industry which the defendants exercised through their patents. It required the defendants to issue patent licenses on a fair royalty basis and "to grant to their existing patent licensees an option . . . (1) to terminate their lease, (2) to continue their lease, or (3) to purchase leased machines . . . ." It also established a method by which reasonable royalty rates under the patents were to be fixed.

The Besser Co. and Jesse H. Besser challenged the judgment of the lower court on three grounds: First, "the factual conclusions of the trial court are erroneous"; second, those portions of the judgment designed to

break defendants' patent control "are punitive, confiscatory and inappropriate"; and, third, the method devised to fix reasonable royalty rates "deprives them of their property without due process of law."

In an opinion by Mr. Justice Jackson, Mr. Justice Clark not participating, the Supreme Court unanimously affirmed the lower court. The appellants' first contention was decisively rejected because the Government's charges "are overwhelmingly supporting by the evidence."

The second ground of the appellants' challenge required but little more consideration. The compulsory licensing and compulsory sale provisions of the judgment were approved because both "are recognized remedies [and] . . . . would seem paricularly appropriate where, as here, a penchant for abuse of patent rights is demonstrated . . . ."

A more difficult issue was posed by the third challenge. The machinery which the trial judge had established for the fixing of reasonable royalty rates required Besser and the Government each to select two persons to serve as arbitrators on a committee to establish such rates. In the event of a stalemate, the four representatives were to choose a fifth to break the deadlock. If the four could not agree on a fifth, the trial judge was to sit as the fifth or appoint another person to serve in his place.

Besser and the Government each appointed their representatives who failed to agree. To break the deadlock the trial judge acted as the fifth arbitrator and, apparently without holding a further hearing, voted for the rates proposed by the government-appointed representatives. Appellants attacked "this procedure with the contention that royalties set must be 'made in judicial proceedings based on the hearing and evaluation of evidence in the light of appropriate criteria.' "

The Supreme Court refused to accept this argument because "it necessarily attacks the sufficiency of the evidentiary material considered in arriving at the royalties finally established. . . . [and the Supreme Court does] not pass on matters of that character in the absence of glaring error not shown here." A second reason for rejecting the appellants' position was that appellants had misunderstood what was done below. It "was always within the power of the trial judge to establish the royalty rates," the Supreme Court said "and, in voting as he did, he did just that." Moreover, "in reducing the terms of a decree to concrete measures" a full hearing is not mandatory. The procedure adopted by the trial judge "was entirely reasonable and fair." It was novel, "but novelty is not synonomous with error."

The Supreme Court's opinion leaves one question, a potentially important question, unanswered. Would the machinery for setting royalties have been approved if an outsider, rather than the trial judge, had acted as the fifth arbitrator? The Court's reliance upon the power of the trial court to fix royalties and its holding that "he did just that" here suggests that the result might have been different if an independent arbitrator had cast the decisive ballot.

JOSEPH BURSTYN, INC. V. LEWIS A. WILSON, ET AL.

(May 26, 1952)

The New York State Board of Regents, after having examined an Italian motion picture entitled "The Miracle," issued a license authorizing its exhibition. Subsequently the picture was shown in a motion picture theater in New York City. Many communications were received by the Board both protesting against and defending the exhibition of "The Miracle." In answer to this public agitation, the film was again reviewed by the Board and its license revoked on the ground that it was "sacrilegious," later defined by the New York Court of Appeals as meaning that a religion, "as that word is understood by the ordinary reasonable person, . . . [was] treated with contempt, mockery, scorn and ridicule . . . ." 303 N.Y. 242, 258 (1951).

Joseph Burstyn, Inc., the corporate distributor of "The Miracle," challenged the Board's ban of "The Miracle" on several grounds, one of which was that the New York statute under which the Board had acted violated "the Fourteenth Amendment as a prior restraint upon freedom of speech and of the press." This challenge was rejected by the New York courts and the distributor appealed to the Supreme Court. In an opinion by Mr. Justice Clark, that Court held unanimously, but with two concurrences,* that New York's ban of "The Miracle" was unconstitutional.

It had been stated in 1915 that "the exhibition of moving pictures is a business pure and simple" and that as such it might not be entitled to the protection of the First and Fourteenth Amendments. *Mutual Film Corp.* v *Industrial Comm'n.*, 236 U.S. 230, 244. New York State urged that "The Miracle," because it was a motion picture, was not protected by the Constitution. The Supreme Court decisively rejected this argument. In doing so, it gave judicial recognition to the fact that the motion picture had become of age as a medium of artistic expression and as a vehicle for the "communication of ideas." This holding that the motion picture is as much entitled to constitutional protection as books, magazines or newspapers is one of the two important aspects of the instant case.

The second important feature of the instant case is the restrictive definition that the Supreme Court gave to the state's interest in protecting religious views, when it considered the constitutionality under the Fourteenth Amendment of the prior restraint which New York had imposed upon "The Miracle." The majority held that the restraint imposed upon "The Miracle" was unconstitutional. It appears to have done so for three separate but not necessarily independent reasons: (1) the restraint was a prior

* The majority opinion was concurred in by six of the Justices. Mr. Justice Reed concurred in a separate opinion. Mr. Justice Frankfurter, joined by Mr. Justice Jackson, also filed a separate concurring opinion. Mr. Justice Burton concurred in both the majority opinion and in Justice Frankfurter's opinion.

restraint; (2) the definition of sacrilegious adopted by New York ("that no religion . . . shall be treated with contempt, mockery, scorn and ridicule") set the censor "adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies"; and (3) "the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures."

The significance of the fact that the restraint here was prior is not clear. Although the Court emphasized that the restraint was prior, it may have believed that the New York Court of Appeal's definition of "sacrilegious" was so indefinite that it did not furnish a constitutional standard even for the punishment of past offences. More important, the fact that the restraint was prior does not seem relevant to the statement of the Court restricting the interest of the state in protecting religions. That statement, on its face, is so categorical that it would seem to require government—unless the public peace or safety were threatened—to abstain from the role of protector of religious doctrine and to require it to permit religious controversy and even public attacks upon dogma. Perhaps these restrictions upon government are proper in a nation which has no established church, which as a democracy tolerates wide disparity of religious views and in which there are essential and critical differences of dogma even among the various sects of the Christian religion. This approach would place the responsibility for the maintenance of church dogma and the discipline of the flock upon the church rather than upon the state. It would insure that the state shall not be made an engine through which the most numerous or most vocal may attempt to censor their fellow citizens.

Committee Report

COMMITTEE ON PROFESSIONAL ETHICS

OPINION B–192

The Committee on Professional Ethics has recently received and answered the following inquiry:

"May a Union attorney prosecute claims for prevailing rate of wages under Section 220 of the Labor Law for Union members pursuant to a retainer to represent the Union?

"While prevailing rate affects men within a particular category, nevertheless, each person so affected has an individual personal claim to the prevailing rate.

"A Union, in an attempt to induce certain employees of the City of New York to join said Union, has advised the prospective members that if they will join the Union, the Union attorney will prosecute their individual claims for prevailing rate, and the only expense to the members will be the monthly dues. Not all members of the Union will be affected by prevailing rate.

"Is it unethical for the attorney to take a retainer from the Union and promise to prosecute the prevailing rate of wage claims?"

OPINION

It would be clearly unethical for an attorney to act as proposed in your letter (OP. B–163). Such conduct would violate Canon 35, which prohibits intervention of lay intermediaries between lawyer and client and prohibits a lawyer from accepting employment from any organization to render legal services to the members of such organization in respect to their individual affairs (Ops. B–58 and B–99). Such conduct would also appear to violate Canon 47, which prohibits a lawyer from permitting his services or name to be used in aid of the unauthorized practice of law by any lay agency (See Penal Law §280, which, among other things, expressly prohibits almost all corporations and voluntary associations from furnishing attorneys or counsel and from rendering legal services of any kind). Such conduct would also appear to be contrary to Rule 1–A of Special Rules Regulating the Conduct of Attorneys and Counsellors-at-law in the First Judicial Department, which prohibits an attorney from advising inquirers or rendering an opinion to them through or in connection with a publicity medium of any kind in respect to their specific legal problems, whether or not such attorney shall be compensated for his services (Cf. Op. B–101).

Such conduct may also constitute advertising by the attorney and also

constitutes, or would seem inevitably to result in, solicitation of professional employment by the attorney, contrary to Canon 27 (Cf. also Ops. B–99 and B–135).

The foregoing opinion is that of the Committee alone and has not been passed upon by the Association.

Respectfully submitted,

COMMITTEE ON PROFESSIONAL ETHICS

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SELECTED LIST OF RECENT MATERIAL ON PROFESSIONAL FEES

Most good lawyers live well, work hard and die poor.
DANIEL WEBSTER

This checklist is a continuation of the series entitled the economics of the legal profession.*

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